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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL., *Petitioners*

v.

WEINACKER'S, INC., *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONERS

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I. THE CONTROVERSY IS PREEMPTED

The deep embedment in the work of the NLRB of the subject of picketing and handbilling on private but open property is illustrated by two cases that we have not previously considered.

1. On December 9, 1969, the Court of Appeals for the Seventh Circuit decided *N.L.R.B. v. Monogram Models*, 72 LRRM 2953. The Court of Appeals con-

unfair labor practice for an employer to threaten non-employee union organizers with arrest and prosecution for criminal trespass for distributing union literature on the shoulder of a highway which, while privately owned, was used for pedestrian travel. The Court explained that (72 LRRM at 2940):

> In our view, the shoulder area here in dispute is legally indistinguishable from a sidewalk. The only difference is that a sidewalk is an improved concrete way for pedestrian travel. This shoulder is thus an unimproved sidewalk or walkway—call it what you will. Access to such a public way is associated with First Amendment rights. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (7th Cir. 1953). Handbilling is within the protection of the First Amendment. *Logan Valley, supra.* The record is devoid of any facts which even hint that the Union agents were disorderly or otherwise removed themselves from the First Amendment's protective pale. Respondent could not, then, without committing a Section 8(a)(1) violation, threaten the non-employee organizers with criminal trespass prosecution, since their use of the property was lawful and protected. *Logan Valley, supra, Marshall Field & Co., supra.*

2. In *Fashion Fair, Inc.*, 159 NLRB 1435, 1440,[1] to remedy the eviction of pickets from a small shopping center, the NLRB entered an order requiring the employer to cease and desist from "Ordering employees to leave public or quasi-public areas while they are lawfully engaged in peaceful picketing of . . . [the employer's] premises or in other lawful concerted activity." The power of the NLRB to enter this order protecting

[1] Noted at p. 13, n. 9, of the NLRB's *amicus* brief.

peaceful picketing from employer infringement bars the power of a State to prohibit or punish the identical class of conduct as a trespass. The minimum purpose of preemption is to prevent the collision which would result were two separate systems of law allowed to operate on the same subject matter. "The second to act must either follow the first, which would make its action useless or vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co.* v. *N.Y.S.L.R.B.*, 330 U.S. 767, 776. The supremacy of federal law avoids conflict by requiring that precedence be accorded to it.

The respondent nevertheless contends that the enjoined conduct in this case is not within the preempted domain. Central to respondent's argument is the assertion that, as the power of the NLRB to adjudicate the subject is activated by the filing of an unfair labor practice charge claiming that the employer has interfered with the rights guaranteed by section 7 of the NLRA in violation of section 8(a)(1), the employer himself has no independent access to the NLRB to assert, and the NLRB has no authority to give him relief, on his contrary claim that the entry of others on his property is prohibitable trespass not protected by federal law (res. br. pp. 5, 28-31). But this argument is foreclosed by this Court's decision in *Garmon*. For, as the quotation from *Garmon* in our opening brief makes crystal clear (br. pp. 16-17), preemption does not depend on assurance that the NLRB will adjudicate the contested conduct. For a variety of reasons, of which the particular one advanced by respondent is no different, the NLRB may or may not take the particular controversy in hand. This makes no difference. The factor which is critical to preemption

is that the class of conduct is within the NLRB's power. If it is, as it clearly is here, then avoidance of conflict requires that the class of conduct be free of State governance. It would be intolerably mischievous if a State, upon a complaint alleging trespass, were to prohibit picketing or handbilling which, on an unfair labor practice charge, the NLRB were to find to be protected activity. Conflicting orders would prohibit in one tribunal the identical conduct which is protected in another tribunal. Preemption precludes that collision by investing the NLRB with sole authority in the field. And occasional lack of decision of a particular controversy by the NLRB is a small price to pay for maintenance of overall adjudicatory harmony. Indeed, if the particular controversy does not happen to be determined by the NLRB, all that it means is that the conduct goes without governmental regulation, and the conclusion that conduct—particularly peaceful picketing and handbilling—is not regulable but is within the free play of contending forces is part of the recognized regime that Congress has established under the NLRA. *Garner* v. *Teamsters Union*, 346 U.S. 485, 500; *Hannah Mining Co.* v. *MEBA*, 382 U.S. 181, 187, 189, 193.

It is also well to recall that part of the reason for preemption is the difference between the state and federal procedures which operate on the controversy. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 242-243; *Garner* v. *Teamsters Union*, 346 U.S. 485, 490. This difference is particularly telling in relationship to the prohibition of picketing and handbilling, the expression of free speech (pet. opening br. p. 29, n. 11). As this case and *Logan Valley* both illustrate, the State initially prohibits picketing and handbilling

solely on an *ex parte* application, so that free speech is squelched during the critical part of the controversy without even prior notice or hearing. The NLRB never acts in this fashion. Its own procedures require full notice and hearing. When it seeks temporary injunctive relief from a federal district court preliminary to its own order pursuant to section 10(j) or (l) of the NLRA, it almost never seeks *ex parte* relief, and never seeks any relief without a prior administrative investigation. The precipitance of state procedure activated by private initiative, in contrast with the care of federal procedure under NLRB control, confirms the need for preemption.

Finally, if preemption does not prevail, it puts this Court to the necessity of deciding for itself whether the State has prohibited federally-protected conduct. For of all the alternatives which may be available, the avenue which is not open is to allow State intercession without federal oversight in a field in which Congress has proclaimed the rules. Absent preemption, this Court is the only federal tribunal which can provide control. This Court has wisely decided that it should not act as the initial federal tribunal and has fashioned preemption to that end (Pet. opening br. p. 48 and n. 27). Respondent would thus require the return to an approach which experience has caused this Court to abandon.[2]

[2] It is possible to assure that the controversy will be brought within the NLRB machinery by a requirement that, as a condition of entertainment of a defendant's preemption plea, the defendant shall file an unfair labor practice charge with the NLRB. We do not, however, suggest this course. Preemption would founder if a state court were free to look to the status of the controversy before the NLRB even to the extent of ascertaining whether a charge has been filed with that agency. It is unfortunately true

II. THE CONTROVERSY IS NOT MOOT

Respondent informs the Court that, while it retains ownership of the property, it no longer operates a store on it, but that it has leased its property to Delchamps, Inc., and Walgreen's, Inc., who operate two separate stores on that property as lessees (res. br. pp. 23-24, A1). Respondent states that this change does not moot the controversy (res. br. pp. 4, 23-25). We agree.

The injunction bars "trespassing upon the property of the complainant [Weinacker's, Inc.] . . ." (A. 16, 95). The property remains in the ownership of Weinacker's. Weinacker's retains full power to invoke the injunction, either during the period of the leases, or at a future time when it may choose to resume operation of a store on its own. As lessor, its ownership interest gives it ample standing to assert that the injunction has been violated by trespass on its property. Those enjoined do not dare assume that the injunction is not

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that many state courts, especially at the *nisi prius* level, are inhospitable to preemption. It is predictable that inquiry into the filing of a charge with the NLRB would quickly turn into a reason for state action, not state forbearance. If preemption is to work the rule must be blunt. And that means that state inquiry must end with ascertainment that the class of conduct is arguably subject to the NLRA, whether or not in a particular instance the NLRB has taken the specific dispute in hand. But if a requirement of the filing of an unfair labor practice charge, where the controversy pertains to access to private but open property, is formulated, it should be given prospective application only. It would be unfair to apply it in this case without any forewarning that it was requisite.

Of course, once the NLRB decides the status of the activity "with unclouded legal significance," and concludes that it is neither protected, prohibited, nor within the free play of contending forces, the State may then act. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246.

in full force. In *Logan Valley*, the action was brought by both the lessor and the lessee. The injunction in this case thus retains its full vitality. The controversy is therefore clearly not moot.

The change does point up the indistinguishability of this case from *Logan Valley*. In this case, there are now two stores operating on the shared property served by a common parking lot, precisely as there was when the injunction was granted in *Logan Valley*. Furthermore, there is undeveloped land on the property available for additional store use in the future (res. br. p. A35). Thus, the only difference between this case and *Logan Valley* is that the shopping center in this case is smaller than in *Logan Valley*. But the fitness of open property for the expression of First Amendment rights in a dispute pertaining to an operation on that property surely cannot be measured by its size.[3]

The change to multiple store operation by separate and independent businesses now also brings into play the NLRA's prohibition of secondary boycotts. As

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[3] The complete answer to respondent's argument (br. pp. 18-23) that at a small shopping center, as opposed to a large one, the right to picket and handbill on the exterior store grounds may be banned because the adjacent publicly-owned street affords the union an adequate opportunity for communication was given by Mr. Justice Black in his concurring opinion in *N.L.R.B.* v. *Fruit and Vegetable Packers*, 377 U.S. 58, 80: "This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." Indeed, respondent's vigorous efforts to remove the pickets from the shopping center here demonstrates the obvious—that picketing and handbilling on the public street is far less effective than picketing and handbilling on the sidewalk directly in front of the entrance to the store.

this Court observed in *Logan Valley*, "Petitioners point out that they could conceivably find themselves charged with conducting an illegal secondary boycott if they do not comply with the rules laid down by the NLRB and the courts governing common situs picketing" (391 U.S. at 323, n. 12). Relegation of the picketing to the public entrances to the parking lot opens the Union to the risk that it will be found guilty of a secondary boycott if it does not adequately circumscribe its picketing to limit its reach to the offending store. Even if properly confined, the picketing of a common entrance necessarily has an impact on others within the area who are unconcerned in the dispute, so that the unavoidable spill-over needlessly embroils neutrals in a controversy not their own. Both the legal risk that the Union runs and the economic consequence that neutral employers suffer are avoided by conducting the picketing and handbilling in the immediate vicinity of the entrance to the store of the offending employer, the natural and effective place of protest. In its current operation, by banishing picketing and handbilling to the removed shared entrances to the parking lot, the injunction undercuts the balance which Congress has drawn between protected primary conduct and prohibited secondary activity.[4]

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[4] For a full description of this aspect of the matter, now completely applicable to the multiple store operation on the property of Weinacker's, see pages 42-49 of petitioners' brief in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, October Term, 1967, No. 478.

Furthermore, were the Union to seek to organize the employees of Delchamps or Walgreen's, and were it to picket in conjunction with this effort, the picketing would implicate another part of the congressional scheme. The picketing might be prohibited by section 8(b)(7), protected by section 7, or within the free play of contending forces. For this aspect of the matter, see pp. 37-42 of petitioners' brief in *Logan Valley*.

Accordingly, for these reasons, in addition to those stated in our opening brief, the judgment should be reversed.

Respectfully submitted,

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